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R. v. B. (D.): **The Constitutionalization of** **Adolescence**

Nicholas Bala*

I. INTRODUCTION: RECOGNIZING THE SPECIAL NATURE OF YOUTH

Canadian law has long recognized that because youths¹ have limited capacities and greater vulnerability than adults, they should be afforded a special status in the criminal justice system. Since the *Youth Criminal Justice Act* [“YCJA”] came into force in April 2003, in a number of important decisions the Supreme Court has generally favoured a “pro-youth” interpretation of Act, restricting the use of custody for young offenders and protecting their legal rights.² The 2008 decision of the Supreme Court in *R. v. B. (D.)*³ significantly extended this protective approach, recognizing that the principle of the “diminished moral blameworthiness” of youth in the criminal justice system has not only a

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¹ A note on terminology: in this paper, the term “child” will generally be used to refer to persons under the age of 12, and “youth” or “adolescent” to refer to those 12 to 17 years inclusive. This is the way that the terms are generally used in Canada’s criminal justice laws, most notably the *Youth Criminal Justice Act*, S.C. 2002, c. 1. In some contexts, however, the terms “youth” and “child” are used synonymously to refer to persons under the age of 18.

² The decisions of the Supreme Court interpreting the sentencing provisions of the YCJA are *R. v. D. (C.)*, [2005] S.C.J. No. 79, [2005] 3 S.C.R. 668 (S.C.C.); *R. v. P. (B.W.)*, [2006] S.C.J. No. 27, [2006] 1 S.C.R. 941 (S.C.C.); *R. v. B. (D.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3 (S.C.C.); and *R. v. C. (S.A.)*, [2008] S.C.J. No. 48, [2008] 2 S.C.R. 675 (S.C.C.); on the legal rights of youth, see *R. v. C. (R.W.)*, [2005] S.C.J. No. 62, [2005] 3 S.C.R. 99 (S.C.C.); *R. v. M. (A.)*, [2008] S.C.J. No. 19, [2008] 1 S.C.R. 569 (S.C.C.) and *R. v. H. (L.T.)*, [2008] S.C.J. No. 50, [2008] 2 S.C.R. 739 (S.C.C.). The recent decision of the Court in *R. v. L. (S.J.)*, [2009] S.C.J. No. 14, 2009 SCC 14 (S.C.C.) also recognized the need to protect youth, and interpreted the YCJA as prohibiting the trial of a young person with an adult co-accused; however, the majority of the Court held that the Crown can prefer a direct indictment of a young person in youth court, denying youths a right to a preliminary inquiry in certain circumstances. Generally on the interpretation and application of the YCJA, see N. Bala, P.J. Carrington & J. Roberts, “Evaluating the Youth Criminal Justice Act After Five Years — A Qualified Success” (2009) 51 Can. J. Criminology & Crim. J. 131 [hereinafter “Bala, Carrington & Roberts”].

³ *Id.*

statutory basis, but also a constitutional foundation. While the Court was unanimous in accepting that the diminished moral blameworthiness of youth is a principle of fundamental justice, it was sharply divided in the application of this newly recognized principle. Writing for a five-member majority of the Court, Abella J. ruled that provisions of the YCJA that impose an obligation on a youth found guilty of a very serious offence to justify not imposing an adult sentence are unconstitutional, while Rothstein J., writing for the dissent, argued that these provisions do not violate section 7 of the *Canadian Charter of Rights and Freedoms*⁴ as Parliament struck an appropriate balance in protecting society and recognizing the special needs of youth. The Court was also divided in its views about whether provisions of the YCJA creating a presumption of allowing for publication of identifying information about youths found guilty of very serious offences were constitutionally valid. The majority took a more expansive view of section 7 of the Charter, finding that the social and psychological stress associated with identifying publicity was engaged, and ruled this provision unconstitutional; the dissent took the position that stigma is not an aspect of liberty or security of the person, and in any event the publication of information about a youth is not state action.

This commentary begins by discussing the context for the *B. (D.)* decision, explaining the role of adult sanctions for youthful offenders, and briefly describing the historical evolution of youth justice and adult sanctions for youth in Canada. The paper next considers previous conflicting appellate jurisprudence on the constitutionality of the provisions of the YCJA that allow for imposition of adult sanctions on youth, and then analyzes *R. v. B. (D.)*. The paper concludes with a discussion of implications of *B. (D.)* for youth justice in Canada. Although *R. v. B. (D.)* is highly controversial,⁵ and the Court was deeply divided in the result, the Court has clearly given constitutional recognition to youth (being under 18 years of age at the time of commission of a crime) as being a status entitled to special protection under the Charter. This “constitutionalization of adolescence” makes this

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

⁵ A critical editorial characterized the majority decision as “baffling”: “Sleight-of-hand at the Supreme Court” (Editorial), *The Globe and Mail*, May 17, 2008, A20. In a relatively rare public response to a decision of the Court, the Minister of Justice issued a critical press release, stating that he was “disappointed” with the decision: “Statement From the Minister of Justice Concerning the Supreme Court of Canada’s Decision on *R. v. D.B.*”, May 16, 2008, <www.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32255.html>.

the most important judgment of the Court regarding youth offending in the history of Canada, and will both affect future judicial approaches to youth justice issues and constrain possible legislative reforms that might make the youth system more “adult-like”. The decision also suggests that a narrow majority of the Court is prepared to take a relatively broad approach to section 7 of the Charter.

II. YOUTH JUSTICE AND ADULT SANCTIONING

All juvenile justice systems have provisions that allow for the most serious of offenders to receive sanctions that are similar or identical to those imposed on adults. Some youths have committed offences that are so serious or pose such a great risk to society that it would be inappropriate to subject them to the limited sentences that are available under juvenile justice laws. The statutory provisions that allow for adult sanctions to be imposed on adolescents are significant not only for the youths directly involved but for the entire juvenile justice system, since they set an outer boundary for that system and help to define its nature. While these laws exist in some form throughout the world, there is great variation in the legislative provisions that allow for adult sanctions to be imposed on youths, and the provisions have been significantly changed in Canada over the years.

In many American states, the decision about whether to seek an adult sentence is made by the prosecutor before trial, and any trial in such a case may be fully publicized. In some states adulthood commences for all criminal law purposes at the age of 16 years. Thousands of juveniles are serving sentences in adult prisons in the United States; in a majority of states, adolescents who commit murder can face life imprisonment without the possibility of parole.⁶ Significantly, however, the United States Supreme Court also recognized that there is a constitutional requirement that the nature of adolescence must be reflected in the legal treatment of adolescents in the criminal justice system. In 2005 in *Roper v. Simmons*,⁷ the U.S. Supreme Court held that it was “cruel and unusual

⁶ C. De La Vega & M. Leighton, “Sentencing Our Children to Die in Prison: Global Law and Practice” (2008) 42 U.S.F. L. Rev. 983; and Jeffrey Fagan, “Juvenile Crime and Criminal Justice: Resolving Border Disputes” (2008) 18(2) *The Future of Children* 10-48.

⁷ 543 U.S. 551 (2005). Until 2005 some 20 states allowed for capital punishment of juveniles convicted of murder. In *Roper v. Simmons*, a 5-4 majority of the Supreme Court of the United States held that it is “cruel and unusual” punishment and a violation of the U.S. Constitution to allow for capital punishment of those who were under 18 years when they committed an offence, without exceptions based on the brutality of the crime or circumstances of the offender. The majority

punishment”, and hence in violation of the 8th Amendment of the American Constitution, to subject a person to capital punishment for a murder committed when he was under the age of 18 years.

In Canada, the process for imposing adult sentences is judicially controlled. Those youths who receive adult sentences will generally only be placed in adult correctional facilities after reaching the age of 18 years, and if they receive a life sentence for murder, are eligible for parole earlier than adults found guilty of the same offence. Although cases involving adult sentences for youths occur relatively rarely in Canada,⁸ these cases involve the most serious, brutal offences, and gain extensive media attention and public interest.

III. HISTORICAL DEVELOPMENT OF YOUTH JUSTICE AND ADULT SANCTIONING

A basic understanding of the history of Canada’s youth justice laws and the evolution of the provisions allowing for adult sanctions to be imposed is important for understanding the significance of *R. v. B. (D.)*, and the Court itself (both the majority and the dissent) gave considerable attention to the historical development of juvenile justice law in Canada.

Historically, children convicted of criminal offences were subjected to the same punishments as adults, including hanging, and children as young as eight years were incarcerated in Kingston Penitentiary. However, at common law, criminal liability started at the age of seven. A child between the ages of seven and 14 could raise a defence of *doli incapax* and would have criminal immunity if it were not proven by the prosecution that the child had the capacity to understand the “nature and consequences of his act and to appreciate that it was wrong”.⁹ In 1857 the first Canadian legislation was enacted to separate convicted child and younger adolescent offenders from adults, placing them in juvenile reformatories rather than adult penitentiaries.

of the U.S. Court cited the prohibition on capital punishment for juvenile offenders in the international *Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, even though the United States is not a signatory. Interestingly, the Supreme Court of Canada in *R. v. B. (D.)* did not mention this American decision, even though it dealt with a similar issue and came to a similar conclusion.

⁸ There is no national data available for adult sentencing under the YCJA, but under the *Young Offenders Act*, R.S.C. 1985, c. Y-1 fewer than 100 cases per year were transferred for trial into adult court and it would appear that well under 100 youths per year are receiving adult sentences under the YCJA.

⁹ Latin for “incapacity to do wrong”; see S.S. Anand, “Catalyst for Change: The History of Canadian Juvenile Justice Reform” (1998) 24 *Queen’s L.J.* 515.

The *Juvenile Delinquents Act* was enacted in 1908,¹⁰ creating a separate juvenile justice and corrections system with a welfare-oriented philosophy for youthful offenders. The age jurisdiction of the Juvenile Court varied by province, with most provinces beginning adult jurisdiction at the age of 16 years, but a few extending Juvenile Court jurisdiction to the 18th birthday. Thus, interestingly, for most of Canada the age of commencement of adulthood for criminal law purposes was, until relatively recently, 16 years of age, an issue ignored by the Supreme Court in *R. v. B. (D.)*, where the Court accepted that the age of 18 years is the commencement of adulthood. Although the issue of the age range for special constitutional protection was accepted without discussion by the Court,¹¹ it was unanimous on this point and this position is consistent with international treaties like the United Nations *Convention on the Rights of the Child*, so it must now be accepted as an established part of Canadian constitutional law that “adulthood”, at least for criminal law purposes, commences at the age of 18.

Under the JDA there was a relatively informal process to allow for the transfer of juveniles aged 14 years or older and charged with serious offences into adult court for trial and, if there was a conviction, to have an adult sentence imposed. A juvenile who was transferred into adult court for trial under the JDA and whose bail was denied was immediately detained in an adult facility pending adult trial and, if convicted of murder, faced the full adult sentence, including the prospect of a capital sentence (while this was a punishment in Canada).¹²

¹⁰ *Juvenile Delinquents Act*, enacted S.C. 1908, c. 40; subject to minor amendments over the years, finally as *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 [hereinafter “JDA”]. For a discussion of the Act, including issues of varying age jurisdiction by province, see Larry Wilson, *Juvenile Courts in Canada* (Toronto: Carswell, 1982).

¹¹ In his dissent, Rothstein J. discussed some of the historical developments in the treatment of young offenders in Canada, and in particular the variation in approaches to the imposition of adult sentences on youth, adults (at paras. 132-138), but he did not explicitly mention the variation in the age jurisdiction of Juvenile Court and the changes in the concepts of “childhood”, “youth” and “adulthood”. By way of contrast, the United States Supreme Court in *Roper v. Simmons*, *supra*, note 7, had a fairly extensive discussion of the rationale for selecting the age of 18 years as the start of adult accountability in terms of capital punishment. The U.S. Court recognized that selection of any age is somewhat “arbitrary”, but considered 18 years most consistent with brain development literature and international norms. Perhaps the American Court felt more of an obligation to discuss this issue because a number of American states still start adult criminal responsibility at 16 or 17 years of age.

¹² Steven Truscott was the last juvenile to face a capital sentence, though his sentence was later commuted. He was eventually released on parole and much later exonerated. See Isabel Lebourdais, *The Trial of Steven Truscott* (London: Gollancz, 1966); and Julian Sher, *Until You Are Dead: Steven Truscott's Long Ride into History* (Toronto: Knopf Canada, 2001).

The *Young Offenders Act*¹³ (in force from 1984 to 2003) established a uniform national age jurisdiction for youth courts from 12 years through to 18th birthday, an important statutory recognition of adolescence as a distinct stage of life, with children under 12 years immune from criminal liability and with full adult liability starting at the age of 18 years. The YOA allowed for a pre-trial application to be made to have a youth aged 14 years or older tried in adult court, and if convicted there, subject to an adult sentence. In dealing with transfer, the youth court judge was to consider a broad range of evidence, some of which was inadmissible in a criminal trial, to determine which court, corrections system and legal regime were preferable for dealing with the youth. In 1992, the Progressive Conservative government amended the transfer provisions of the YOA to stipulate that the “protection of the public” was to be the paramount consideration, though also rendering youths transferred to adult court for murder eligible for parole earlier than adults.¹⁴

In 1995 the Liberal government enacted another set of amendments to the Act, again primarily intended to demonstrate to the public that it was getting “tougher”, in particular for the most violent youthful offenders.¹⁵ While the 1995 amendments offered some protection to youth by providing that even if an adult sentence was imposed, a youth could remain in a youth corrections facility until reaching adulthood, a central feature of these amendments was the creation of the “presumptive offence”. The 1995 amendments to the YOA introduced a category of charges for which a 16- or 17-year-old youth would presumptively be dealt with in adult court, unless the young person satisfied a youth court judge that the case should be dealt with in the youth system.¹⁶ For 16- and 17-year-old youths charged with murder, attempted murder, manslaughter or aggravated sexual assault, the youth had the onus to show why the case should not be dealt with in adult court. For all other offences for older youths, and for 14- and 15-year-old youths charged

¹³ R.S.C. 1985, c. Y-1, enacted as S.C. 1980-81-82-83, c. 110 [hereinafter “YOA”].

¹⁴ *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1992, c. 11. See N. Bala, “Dealing with Violent Young Offenders: Transfer to Adult Court and Bill C-58” (1990) 9 *Can. J. Fam. L.* 11.

¹⁵ *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19. See N. Bala, “The 1995 *Young Offenders Act* Amendments: Compromise or Confusion?” (1994) 26 *Ottawa L. Rev.* 643.

¹⁶ In theory, the Crown could also make an application under s. 16(1.01) of the YOA to have charges against a 16- or 17-year-old for a presumptive offence murder to be “transferred down” into the youth court for trial, in which the Crown would have the onus of justifying this outcome. In practice, it was the youth who made the application.

with any offence, including the presumptive offences, there was an onus under the YOA on the Crown to satisfy the court that the case should be transferred. There is often real difficulty in determining how a youth will respond to the rehabilitative services provided in custody and how great a future danger a youth may pose to society. Accordingly, the onus under the YOA could be very important for determining the outcome of transfer proceedings.¹⁷

A major objective of the *Youth Criminal Justice Act*, which came into effect in 2003 and continued the 12 to 18 years of age jurisdiction of the YOA, was to reduce the use of the courts and custody for the majority of adolescent offenders. The Act has had significant success in achieving this objective.¹⁸ However, at the time the YCJA was introduced, the Liberal government also prominently publicized aspects of the Act intended “to respond more firmly and effectively to the small number of the most serious, violent young offenders” in order to address the “disturbing decline in public confidence in the youth justice system” in Canada.¹⁹ To expedite the decision-making process about adult sentences, the YCJA eliminated the time-consuming pre-trial transfer hearing, and provides that the decision about whether to impose an adult sanction is to be made only if there is a conviction as part of sentencing.

Significantly, the YCJA extended the concept of the “presumptive offence”, adding the new third “serious violent offence” to the YOA list of the four enumerated most serious offences (murder, attempted murder, manslaughter and aggravated sexual assault). Further, the YCJA reduced the age for presumptive offences. While youths aged 14 years or over were subject to transfer under the YOA, it was only 16- and 17-year-olds charged with the most serious offences who were presumed liable to an adult sentence. The YCJA lowered to 14 years the age at which an onus to justify a youth sentence was placed on the youth found guilty of a presumptive offence.²⁰ For presumptive offences, section 72 provided that a youth court judge was required to impose an adult sentence on youths 14 years or older at the date of the offence, unless the young

¹⁷ *R. v. H. (H.A.)*, [2000] O.J. No. 4200, 51 O.R. (3d) 321 (Ont. C.A.).

¹⁸ See Bala, Carrington & Roberts, *supra*, note 2.

¹⁹ Then Justice Minister Anne McLellan (Press Release, Canada, Department of Justice, May 12, 1999). See also Anne McLellan, *Hansard*, Senate Committee on Legal and Constitutional Affairs, Hearings on Bill C-7, September 27, 2001.

²⁰ Section 61 allows a province to select 15 or 16 as the age for the presumptive regime of the YCJA. Quebec and Newfoundland chose 16 years as the minimum age for presumptive adult sentencing.

person could satisfy the onus of establishing that a youth sentence would be of “sufficient length” to hold the youth “accountable”.

If an adult sentence is imposed, section 76 of the YCJA creates a presumption that a young person who is under 18 years of age at the time of receiving the adult sentence will be placed in a youth custody facility, with provisions for transfer to an adult facility upon reaching the age of 18. However, the sentencing court may order that a youth under the age of 18 and subject to an adult sentence is to be placed in an adult facility if this is in the “best interests” of the young person or necessary to ensure “the safety of others”. If a person who was a youth at the time of the offence receives a life sentence for murder, there will be eligibility for parole at an earlier date than an adult, reflecting the limited accountability of even those youths convicted of the most serious offences and receiving an adult sentence.

IV. CONFLICTING APPELLATE DECISIONS PRIOR TO *R. v. B. (D.)*

1. The Quebec Court of Appeal in *Québec v. Canada*

Prior to the YCJA coming into effect, the Quebec government brought a reference case before the Court of Appeal in that province, arguing that several provisions of the YCJA, including those governing adult sentencing and allowing for the publication of identifying information about young offenders found guilty of serious offences, are incompatible with international law and in violation of the Charter. Just before the YCJA came into effect, a five-judge panel of the Court of Appeal rendered its decision in *Reference re Bill C-7 respecting the criminal justice system for young persons [Québec v. Canada]*,²¹ holding that the “principles of fundamental justice” in section 7 of the Charter include the right of young persons to treatment separate from adults. The Court based its approach to section 7 of the Charter both on the long history of special treatment of juvenile offenders in the Canadian justice system and on international law, in particular the *Convention on the*

²¹ [2003] Q.J. No. 2850, 10 C.R. (6th) 281 (Que. C.A.) [hereinafter “*Québec v. Canada*”]. For a fuller discussion of this decision, see S. Anand & N. Bala, “The Quebec Court of Appeal *Youth Justice Reference*: Striking Down the Toughest Part of the New Act” (2003) 10 C.R. (6th) 397.

*Rights of the Child.*²² The Court ruled that the “principles of fundamental justice” include recognition that:²³

- (1) The treatment of young offenders in the criminal justice system must be separate and different from the treatment of adults.
- (2) Rehabilitation, not repression and deterrence, must be the basis of legislative and judicial intervention involving young offenders.
- (3) The youth justice system must restrict disclosure of the identity of minors in order to prevent stigmatization, which could limit rehabilitation.
- (4) The youth justice system must consider the best interests of the child.

Some of these principles are very broad and, as discussed below, the fourth (the “best interests principle”) is clearly inconsistent with subsequent Supreme Court jurisprudence. However, the Quebec Court of Appeal limited the effect of these principles by engaging in an internal balancing exercise within section 7 when applying them. Consistent with prior Supreme Court of Canada section 7 Charter jurisprudence,²⁴ the Court of Appeal held that these principles must be applied so as to strike a “certain balance” between the public’s right to be protected and the right of youths to be treated differently from adults and to have rehabilitation as the main focus of decisions that concern them.²⁵

The Quebec Court of Appeal ruled unconstitutional section 72(2) of the YCJA, which places an onus on youths 14 years of age or older and found guilty of a “presumptive offence” to justify why they should be sentenced as youths rather than as adults. The Court concluded that this provision places an “excessive burden [on youth], considering the vulnerability of the young persons on whom it rests and the purposes” of the YCJA.²⁶ Consistent with its articulation of a principle of prevention of stigmatization of youth, the Court of Appeal also held that sections 75 and 110(2)(b) violate section 7 of the Charter to the extent that they impose on a young person the burden of justifying maintenance of a

²² Can. T.S. 1992 No. 3.

²³ *Québec v. Canada*, *supra*, note 21, at paras. 215 and 231.

²⁴ See *Cunningham v. Canada*, [1993] S.C.J. No. 47, [1993] 2 S.C.R. 143 (S.C.C.). The concept of “internal balancing” is distinguished from the “external balancing” that is required when s. 1 of the Charter is invoked.

²⁵ *Québec v. Canada*, *supra*, note 21, at para. 237.

²⁶ *Id.*, at para. 249.

publication ban rather than imposing on the prosecutor the burden of justifying lifting the ban.

In May 2003, in response to the Quebec Court of Appeal judgment, the then federal Liberal government announced that the decision would not be appealed, and that it would “soon” introduce amendments to the YCJA to make the Act consistent with that decision. The purpose of these amendments would have been to ensure a uniform national response, and to resolve some procedural issues about how and when an adult sentence can be imposed. In fact, legislative amendments to deal with this issue were *not* introduced.

2. The British Columbia Court of Appeal: *R. v. T. (K.D.)*

In its January 2006 decision in *R. v. T. (K.D.)*,²⁷ the British Columbia Court of Appeal declined to follow the decision of the Quebec Court of Appeal, and upheld the constitutional validity of section 72(2). The British Columbia Court held that section 7 of the Charter does not include as a principle of fundamental justice that young offenders are presumptively to be treated differently from adults.

One important reason that the British Columbia Court gave for rejecting the approach of the Quebec Court²⁸ was that the fourth “principle of fundamental justice” which the Quebec Court recognized, that the youth court system must make decisions that “consider the best interests of the child”, was rejected by the Supreme Court of Canada in its 2004 decision in *Canadian Foundation for Children, Youth and the Law v. Canada*.²⁹ In that case McLachlin C.J.C. wrote for the majority, upholding the constitutional validity of section 43 of the *Criminal Code*,³⁰ which authorizes use of reasonable force for the purpose of correction of children. In the course of her judgment, she concluded that requiring decisions to be made in accordance with the “best interests of the child” is *not* a principle of fundamental justice, as the principle is too vague to be given constitutional effect.

While it is true that this fourth principle — the best interests principle — was rejected as a principle of fundamental justice by the Supreme Court in *Canadian Foundation for Children*, the Quebec Court

²⁷ [2006] B.C.J. No. 253, 37 C.R. (6th) 243 (B.C.C.A.).

²⁸ *Id.*, at para. 29.

²⁹ [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.) [hereinafter “*Canadian Foundation for Children*”].

³⁰ R.S.C. 1985, c. C-46.

did not even mention this particular principle in dealing with the Charter challenge to section 72(2), but rather focused on the first three of the principles — that youths must be treated separately from adults and in a way that focuses on their rehabilitation and protects their privacy.

Another argument that the British Columbia Court of Appeal considered significant is that section 72(2) of the YCJA does “not place an onerous burden on the convicted youth”. In taking this approach to section 72(2), the Court placed significant emphasis on an interpretation given to the transfer provisions of the YOA by the Supreme Court of Canada in its 1989 decision in *R. v. M. (S.H.)*, where McLachlin J. (as she then was) wrote:

[T]hat application of the concepts of burden and onus to the transfer provisions of the YOA may not be helpful ... Nor do I find it helpful to cast the issue in terms of a civil or criminal standard of proof. Those concepts are typically concerned with establishing whether something took place. ... But it is less helpful to ask oneself whether a young person should be tried in ordinary court “on a balance of probabilities.” One is not talking about something which is probable or improbable when one enters into the exercise of ... weighing and balancing all the relevant considerations, [to decide whether] ... the case should be transferred to ordinary court.³¹

Despite the reliance of the British Columbia Court of Appeal on this passage, it is not relevant for deciding about the interpretation or constitutionality of section 72(2) of the YCJA, since the Supreme Court in *R. v. M. (S.H.)* was considering the 1984 version of the YOA, which placed no onus on any party at a transfer hearing, but simply stated that the youth court was to be “satisfied” that transfer should occur. It was only in 1995 that the YOA was amended to introduce the concept “presumptive offences”, placing an onus on youths charged with one of these most serious offences to satisfy the court they should not be tried as adults.³² It is that onus provision, reworked in the YCJA section 72(2), which is the subject of controversy in *R. v. B. (D.)*.

It is true that in practice, even if the onus is on the Crown, the youth is still very likely to adduce evidence about his or her background and character, and to attempt to establish that he or she is likely to be rehabilitated within the youth justice system. However, there are clearly

³¹ [1989] S.C.J. No. 93, 50 C.C.C. (3d) 503, at 546 (S.C.C.), quoted by the B.C. Court of Appeal, *supra*, note 27, at para. 59 (emphasis omitted).

³² YOA, s. 16(1.1), as enacted by S.C. 1995, c. 19.

cases in which the issue of onus will be determinative of the outcome, and *R. v. T. (K.D.)* may well have been one of them. It is notable that in *T. (K.D.)* the trial judge found that section 72(2) was unconstitutional, placed an onus on the Crown and decided not to impose an adult sentence, while the Court of Appeal upheld the constitutionality of the provision, placed an onus on the youth and imposed an adult sentence.

3. The Ontario Court of Appeal: *R. v. B. (D.)*

Just six weeks after the British Columbia Court of Appeal decision in *R. v. T. (K.D.)*, the Ontario Court of Appeal rendered its contrary decision in *R. v. B. (D.)*,³³ agreeing with the 2003 Quebec Court of Appeal ruling that section 72(2) of the YCJA violates section 7 of the Charter. In *B. (D.)*, a 17-year-old youth punched another youth without warning (a “sucker punch”) while they watched two other adolescents fight; the young offender knocked the victim to the ground, punched the victim while he was on the ground and then fled. By the time the paramedics arrived, the victim had no vital signs, and he died shortly afterwards at the hospital. The youth was arrested the following day and pleaded guilty to manslaughter. As he was 17 years old, the Crown sought to apply the presumptive offence provisions of section 72(2). The trial judge, however, accepted the youth’s argument that sections 72(2) and 75 of the YCJA violate section 7 of the Charter, and placed the onus on the Crown to justify an adult sentence as necessary to hold the youth “accountable”.

The youth had prior findings of guilt for possession of stolen property and robbery involving threats and intimidation, and had mental health issues as well as a history of behavioural problems in school. He expressed remorse and took some positive steps while in pre-sentence detention, and a court-ordered assessment report recommended treatment in a structured youth-oriented environment to reduce the risk of him re-offending. The trial judge rejected the Crown’s application and sentenced the youth to the maximum youth sentence, an intensive rehabilitative custody and supervision order for a period of three years, lengthening the effective sentence by denying the youth any credit for the one year he

³³ [2006] O.J. No. 1112, 37 C.R. (6th) 265 (Ont. C.A.). The Ontario decision also followed the Quebec judgment in ruling that ss. 75 and 110(2)(b) of the YCJA violate s. 7 of the Charter, by imposing on the youth found guilty of a presumptive offence but not subject to adult sanction the onus to justify a ban on the publication of identifying information.

spent in pre-trial custody. The Court of Appeal upheld the decision, as did the Supreme Court of Canada.

The Ontario Court of Appeal decision discussed the importance of the section 7(2) onus, concluding that it is “significant”, involving both a tactical onus of adducing evidence and a burden of persuasion, and observing that, at least in theory, for presumptive offences, the Crown might succeed in having an adult sentence imposed even if it introduced no evidence or argument to justify this result.³⁴ The Ontario Court of Appeal also rejected the argument of the Crown that section 1 of the Charter could be invoked to save this provision, noting that the Crown conceded that it faces a very significant onus in trying to save any impugned provision under section 1 if it is found to violate section 7 of the Charter.³⁵

While the outcome of the constitutional challenge was the same in the Ontario and Quebec Court of Appeal decisions, the Ontario judgment is narrower, both in its scope and in its analysis. The Ontario Court recognized that the 2004 decision of the Supreme Court in *Canadian Foundation for Children* had an impact on how section 7 of the Charter should be applied. As noted by the Ontario Court of Appeal, the Supreme Court held that in deciding what constitutes a principle of fundamental justice, consideration must be given to both the “traditions that [establish] the basic norms for how the state deals with its citizens” and to international law.³⁶ The Ontario Court concluded that both of these factors support acceptance as a principle of fundamental justice that there is a “need to treat young persons separately and not as adults in administering criminal justice”,³⁷ and placed a burden on the Crown to justify the imposition of an adult sentence and the lifting of the publication ban.³⁸

³⁴ *Id.*, at paras. 35 and 68.

³⁵ *Id.*, at paras. 81-83.

³⁶ *Id.*, at para. 52, quoting from the Supreme Court of Canada decision in *Canadian Foundation for Children*, *supra*, note 29, at para. 8.

³⁷ *R. v. B. (D.)*, *id.*, at para. 53.

³⁸ *Id.*

V. THE SUPREME COURT IN *R. v. B. (D.)*

1. “Presumption of Diminished Moral Blameworthiness”

In May 2008, the Supreme Court rendered its decision in *R. v. B. (D.)*,³⁹ ruling that the presumption of adult sentencing in section 72(2) of the YCJA violates section 7 of the Charter. In coming to this conclusion, Abella J.⁴⁰ took a somewhat different approach to section 7 of the Charter than the Ontario Court of Appeal in *D. (B.)*, and a clearly narrower approach than the Quebec Court of Appeal in *Québec v. Canada*. Justice Abella observed that those two appellate courts accepted the principle “that young persons should be dealt with separately from adults based on their reduced maturity”.⁴¹ While she agreed that this is “important”, she concluded that this principle was not engaged in this case, as the YCJA already established a separate youth justice system.

Justice Abella based her analysis on the “widely acknowledged [fact] that age plays a role in the development of judgment and moral sophistication”, accepting this “reality” largely on the basis of judicial notice.⁴² Accordingly, she held that “because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment”, and it is a “principle of fundamental justice” that there is a “presumption of diminished moral blameworthiness or culpability” for those under the age of 18.⁴³

In coming to this conclusion, she found that this principle met all three of the requirements of a principle of fundamental justice, as set out by the Court in *R. v. Malmo-Levine*; *R. v. Caine*.⁴⁴ She reviewed the historical treatment of children under the common law defence of *doli incapax* and the enactment of Canada’s youth justice legislation and wrote:

³⁹ *Supra*, note 2.

⁴⁰ *Id.*, McLachlin C.J.C. and Binnie, LeBel and Fish JJ. concurring.

⁴¹ *Id.*, at para. 40.

⁴² *Id.*, at paras. 60 and 62. She quoted from three legal and one criminology text to establish this proposition: Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003); Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001); Gilles Renaud, *Speaking to Sentence: A Practical Guide* (Toronto: Thomson Carswell, 2004); and A.N. Doob, V. Marinos & K.N. Varma, *Youth Crime and the Youth Justice System in Canada: A Research Perspective* (Toronto: Centre of Criminology, University of Toronto, 1995), at 56-71.

⁴³ *R. v. B. (D.)*, *id.*, at para. 41.

⁴⁴ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 113 (S.C.C.) [hereinafter “*Malmo-Levine*”]. She concluded (*id.*, at para. 125) that the “presumption of reduced moral blameworthiness of young persons is (1) a legal principle (2) about which there is significant societal consensus that it is fundamental to the way the legal system ought to fairly operate and (3) it is sufficiently precise to yield a manageable standard against which to measure deprivations of life, liberty or security of the person”.

Canada ... has consistently acknowledged the diminished responsibility and distinctive vulnerability of young persons in all of the YCJA's statutory predecessors

.....

This legislative history confirms that the recognition of a presumption of diminished moral blameworthiness for young persons is a long-standing legal principle

.....

[This] confirms, in my view, that a broad consensus reflecting society's values and interests exists, namely that the principle of a presumption of diminished moral blameworthiness in young persons is fundamental to our notions of how a fair legal system ought to operate.⁴⁵

In concluding that the principle of diminished moral blameworthiness of youth is a principle of fundamental justice, Abella J. considered international law as well as domestic legal history. She emphasized that Canada has ratified the United Nations *Convention on the Rights of the Child*, which recognizes the special vulnerability of those under the age of 18, and observed:

This consensus also exists internationally ... “[e]very legal system recognizes that children and youths are different from adults and should not be held accountable for violations of the criminal law in the same fashion as adults” ... This is so because “generally speaking, the assumption is that the youthfulness of an offender mitigates the punishment that youths should receive and that youths should be kept separate from adult offenders.”⁴⁶

Significantly Rothstein J., writing for the dissent, accepted that the principles of fundamental justice include two principles relevant to this case, namely, that young persons have reduced moral blameworthiness for criminal conduct, and that the Crown has the burden of proving aggravating sentencing factors beyond a reasonable doubt. His dissent dealt with the application rather than the acceptance of these principles.

2. Unconstitutionality of Reverse Onus for Adult Sentence

In deciding that the presumption of adult sentencing violates the Charter principle of diminished moral blameworthiness of youth, Abella

⁴⁵ *R. v. B. (D.)*, *supra*, note 2, at paras. 48, 59 and 68.

⁴⁶ *Id.*, at para. 67 (references omitted).

J. noted that section 72(2) creates an onus that “implicates three elements — procedural, tactical and persuasive”. She concluded that that creates an unconstitutional “reverse onus” on youth:

Because the presumptive sentence is an adult one, the young person must provide the court with the information and counter-arguments to justify a youth sentence. If the young person fails to persuade the court that a youth sentence is sufficiently lengthy based on the factors set out in s. 72(1), an adult sentence must be imposed. This forces the young person to rebut the presumption of an adult sentence, rather than requiring the Crown to *justify* an adult sentence. It is therefore a reverse onus.

... [T]he onus provisions in the presumptive offences sentencing regime stipulate that it is the offence, rather than the age of the person, that determines how he or she should be sentenced. This clearly deprives young people of the benefit of the presumption of diminished moral blameworthiness based on age. By depriving them of this presumption because of the crime and *despite* their age, and by putting the onus on them to prove that they remain entitled to the procedural and substantive protections to which their age entitles them, including a youth sentence, the onus provisions infringe a principle of fundamental justice.⁴⁷

Justice Abella also held that the presumption of adult sentencing for a youth violates another principle of fundamental justice, namely, that the onus should always be on the Crown to establish aggravating circumstances that would justify imposing a more severe sanction on a person:

The onus on the young person of satisfying the court of the sufficiency of the factors in s. 72(1) so that a youth sentence can be imposed also contravenes what the Crown concedes ... is another principle of fundamental justice, namely, that the Crown is obliged to prove, beyond a reasonable doubt, any aggravating factors in sentencing on which it relies. Putting the onus on the young person to prove the *absence* of aggravating factors in order to justify a youth sentence, rather than on the Crown to prove the aggravating factors that justify a lengthier adult sentence, reverses the onus.⁴⁸

Although ruling that a *presumption* of adult sentencing violates the Charter, the majority of the Court clearly accepted that adult sentences for young offenders are not *per se* unconstitutional, as long as the onus is

⁴⁷ *Id.*, at paras. 75 and 76 (emphasis in original).

⁴⁸ *Id.*, at para. 78 (emphasis in original).

on the Crown to establish that “the seriousness of the offence and the circumstances of the offender” justify this sanction, notwithstanding his or her age.⁴⁹

Justice Abella undertook a relatively brief section 1 analysis, beginning by noting that “violations of s. 7 are seldom salvageable by s. 1,”⁵⁰ and concluding that the onus requirements regarding adult sentencing and publication of identifying information do not survive either the rational connection or minimal impairment branches of the section 1 analysis. She observed that Parliament’s objectives of accountability, protection of the public and public confidence in the administration of justice can as easily be met by placing the onus on the Crown, while placing the onus on young persons is inconsistent with the presumption of their diminished moral blameworthiness.

Justice Rothstein wrote a vigorous dissent, arguing that the presumptive offence sentencing provisions of the YCJA do not violate section 7 of the Charter.⁵¹ He argued that fundamental justice does not require that there is always a “presumption of youth sentences for young persons”, as this presumption failed to satisfy the test of *Malmo-Levine*;⁵² there is a lack of “sufficient precision” as to what constitutes a youth sentence to allow this to be a principle of fundamental justice; and further there is “no societal consensus that such a presumption is a vital component” of Canadian “notions of justice”.⁵³ Taking a more deferential approach to legislators than the majority, he observed that in enacting the presumptive offence scheme, it was appropriate for Parliament to “balance” the competing interests, on the one hand, of youth to have their reduced moral blameworthiness taken into account and, on the other, of society to be protected from violent young offenders and to have confidence that the youth justice system ensures the accountability of violent young offenders. He concluded that this balancing was a legitimate exercise of Parliament’s authority to determine how best to penalize particular criminal activity.

⁴⁹ *Id.*, at para. 77.

⁵⁰ *Id.*, at para. 89.

⁵¹ Justices Deschamps, Charron and Bastarache concurring.

⁵² *Supra*, note 44, at para. 113.

⁵³ *R. v. B. (D.)*, *supra*, note 2, at para. 131.

3. Unconstitutionality of Reverse Onus for Publication of Identifying Information

Like the previous youth justice legislation, the YCJA has provisions that generally prohibit the publication of identifying information about youths involved in the criminal justice system, based on the belief that such publication can make their rehabilitation and reintegration into society more difficult, and is inconsistent with notions of limited accountability.

One of the major public criticisms of the YOA was that it denied the public the right to know the identity of violent young offenders who might pose a risk to their community after their release. At least in part this concern may have been fed by media that feel constrained by the restrictions on the publication of certain types of information, though it is far from clear that allowing the publication of the identity of young offenders actually does anything to promote community safety. Indeed, to the extent that publicizing the identity of young offenders and their resulting stigmatization may make rehabilitation and reintegration into society more difficult, identifying youth in the media may actually increase the risk to the public. However, in response to public and political pressure, as enacted, the YCJA provided more scope for the publication of identifying information about adolescents who are convicted of serious violent offences.

Similar to the provisions of the YOA, under the YCJA if a decision is made to impose an adult sentence on a young offender, the provisions of the YCJA that prevent the publication of identifying information no longer apply. Further, the YCJA reduced protections afforded youth under the YOA, permitting a youth court to make an order allowing for publication of identifying information about a youth aged 14 years or older and found guilty of a “presumptive offence”, even if the court decided not to impose an adult sentence. Subsection 75(3) required a youth court dealing with this issue to determine whether it considered publication “appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest”.

Subsection 75(1) placed the burden on the applicant (inevitably the young person) to establish that a publication ban should be imposed if the youth were found guilty of a presumptive offence. However, in *R. v. B. (D.)*,⁵⁴ after concluding that the presumption of adult sentencing for

⁵⁴ *Id.*

those youth found guilty of the most serious offences violated the Charter, Abella J. also ruled that the “reverse onus” on the prohibition on publication of identifying information contained in section 75 of the YCJA was unconstitutional.⁵⁵ She took a broad view of section 7 of the Charter, observing that the “greater psychological and social stress”⁵⁶ resulting from identifying publicity renders a sentence “significantly more severe”. She ruled that the lifting of the ban on publication of identifying information is an aspect of sentencing, and hence engages section 7 of the Charter:

Similarly, I see the onus on young persons to demonstrate why they remain entitled to the ongoing protection of a publication ban to be a violation of s. 7 ... the effect of the reverse onus provisions is that if a young person is unable to persuade the court that a youth sentence should be imposed, an adult sentence is imposed. When an adult sentence is imposed, the young person loses the protection of a publication ban. But even if the young person succeeds in discharging the reverse onus and receives a youth sentence, the YCJA imposes an additional onus by requiring the young person to apply for the ban that normally accompanies a youth sentence.

In s. 3(1)(b)(iii) of the YCJA, as previously noted, the young person’s “enhanced procedural protection ... *including their right to privacy*”, is stipulated to be a principle to be emphasized in the application of the Act. Scholars agree that “[p]ublication increases a youth’s self-perception as an offender, disrupts the family’s abilities to provide support, and negatively affects interaction with peers, teachers, and the surrounding community.”⁵⁷

On the issue of the constitutional validity of section 75(3), Rothstein J. also dissented, concluding that this provision does not engage section 7 of the Charter. He argued that a youth’s right to liberty and security of the person are not affected by such an order, as a publication ban is not part of the sentence, nor does it physically restrain youths or prevent them from making fundamental personal choices. Further, to the extent that a youth may be stigmatized by publication of identifying information, this does not involve state action, but rather is caused by the media, and

⁵⁵ *Id.*, at para. 95.

⁵⁶ *Id.*, at para. 87.

⁵⁷ *Id.*, at paras. 83 and 84 (emphasis in original), quoting from Nicholas Bala, *Young Offenders Law* (Concord, ON: Irwin Law, 1997), at 215. A statutory prerequisite to putting the onus on the young person to justify a publication ban on his or her identifying information was that the Crown had made an unsuccessful application to have an adult sentence imposed on the young person.

hence the Charter is not engaged. Justice Rothstein took a narrower approach to the scope of section 7 of the Charter than the majority; his approach seems less consistent with previous jurisprudence that has recognized the psychological as well as the physical aspects of “liberty and security of the person”.⁵⁸

Despite the majority decision in *R. v. B. (D.)*, the publication of identifying information about a youth is in theory still permitted even if the young person receives a youth sentence, with the Crown bearing the burden of justifying removal of the publication ban. In practice, however, if a youth court decides not to impose an adult sentence, an application by the Crown seems unlikely to satisfy the test of subsection 75(3), and *R. v. B. (D.)* has effectively ended the possibility of publication of identifying information about youths who are not subject to an adult sentence.

VI. RESPONDING TO SERIOUS YOUTH OFFENCES IN A CONSTITUTIONAL FASHION

Some adolescents commit very violent crimes; their impulsiveness, lack of foresight and limited moral development can result in callous, senseless acts that have tragic consequences and understandably shock their communities. Fortunately these crimes are relatively rare, but their relative infrequency and their often brutal nature contribute to the heightened media and public attention when they do occur. There are youths, few in number, who have committed the most serious offences, for whom accountability and protection of the public may require an adult sentence, and perhaps even a lifetime in custody.

It must, however, be appreciated that the limited moral and psychological development of adolescents requires that the justice system should generally hold them less accountable than adults who commit similar offences. Further, adolescents who end up serving all, or a portion, of their sentences in adult correctional facilities may pose a greater risk of re-offending than those who serve their entire sentences in the youth system.⁵⁹ Thus, the legal regime for young offenders reserves

⁵⁸ See, e.g., *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.); and *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.).

⁵⁹ See, e.g., D.M. Bishop *et al.*, “The Transfer of Juveniles to Criminal Court: Does it Make a Difference?” (1996) 42 *Crime & Delinquency* 171; Richard Redding, “Juvenile Transfer Laws: An Effective Deterrent to Delinquency”, [August 2008] *Juvenile Justice Bulletin* (see <<http://www>

an adult sentence for the exceptional cases, those where a youth has been found guilty of the most serious offence and is likely to pose a significant risk to public safety if an adult sentence is not imposed.

Adult sentencing for the most violent of young offenders may be justified on accountability principles and because of the need to protect society from those who pose a serious long-term risk, but it will not prevent violent youth offending. Placing an onus on the Crown to always justify with extraordinary treatment is consistent with the Supreme Court's recognition of the constitutional presumption of diminished moral blameworthiness of youth and international law, as reflected in the *Convention on the Rights of the Child*.

A reduction in serious violent offending cannot be achieved by a legal "quick fix", but rather requires a resource-intensive combination of preventative, enforcement and rehabilitative services. Although there is no national data on adult sanctioning under the YCJA, it is clear that only a relatively small number of youth have received this sanction. Some argue that increasing the number of youth receiving adult sentences would increase social protection.⁶⁰ However, experience and social science research from the United States clearly indicate that increasing the number of youths subject to adult sentences does not have a deterrent effect on other offenders or enhance the protection of society. The unfortunate reality is that those youths who commit the most serious and senseless crimes are precisely those who lack foresight and judgment, and who will not be deterred by adult sentences. Indeed, there is significant evidence that adolescents who are placed in adult prison are more likely to re-offend on release than adolescents who have committed the same offences and have the same prior records but are kept in youth custody facilities.⁶¹ This is not surprising when one considers the relative rehabilitative value and inmate subculture in the different types of custody facilities.

ojp.usdoj.gov/ojjdp>); and Benjamin Steiner & Emily Wright, "Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?" (2006) 96 J. Crim. L. & Criminology 1451.

⁶⁰ D.M. Bishop *et al.*, *id.*

⁶¹ See D.L. Myers, "The Recidivism of Violent Youth in Juvenile and Adult Court: A Consideration of Selection Bias" (2003) 1 Youth Violence and Juvenile Justice 79; and L. Winner, L. Lanza-Kaduce, D.M. Bishop & C.E. Frazier, "The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term" (1997) 43 Crime and Delinquency 548.

VII. CONCLUSION: THE CONSTITUTIONALIZATION OF ADOLESCENCE

While the decision in *R. v. B. (D.)* was controversial, it is submitted that it was correctly decided. The restrictive judicial approach to the adult sentencing provisions in the judgment of Abella J. is consistent with the intent of Parliament in enacting the YCJA, as revealed in the principles in the Act. These principles emphasize the special needs and vulnerabilities of youths as well as their amenability to rehabilitation, and recognize that youths should not be held as accountable for their crimes as adults. This protective approach is also consistent with the previous decisions of the Court interpreting the YCJA, decisions which were all “pro-youth”. Further, a narrow judicial approach to adult sentencing of youth is also consistent with a long history of special treatment of youth, and with Canada’s commitments under international law.

For some criminal law issues, most notably in regard to youthful offenders being dealt with by the police and in courts, this is reflected in interpretations of the Charter which afford youth special protections. In other contexts, however, an approach to the Charter that takes account of the limited maturity of youth may result in decisions that afford youths fewer rights than adults, albeit only if the court accepts that this is necessary to promote their welfare.⁶²

In *R. v. B. (D.)* the Supreme Court established a constitutional foundation for the special, protective approach taken to youths in the criminal justice system. The Court has unanimously taken a new approach to section 7 of the Charter, adopting as one of the principles of fundamental justice the “principle of diminished moral blameworthiness” of youth, giving constitutional status to adolescence. While the Supreme Court was divided in the application of this principle in *B. (D.)*, this newly recognized principle is very significant, and has already influenced how that Court⁶³ and the lower courts⁶⁴ are dealing with rights of youth to special and separate treatment from adults.

⁶² See *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.) and *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, 2009 SCC 30 (S.C.C.).

⁶³ The 2009 decision of the Supreme Court in *R. v. L. (S.J.)*, *supra*, note 2, also recognized the need to protect youth, and interpreted the YCJA as prohibiting the trial of a young person with an adult co-accused. Trials with co-accused adults were permitted under the YOA if a youth charged with a very serious offence was transferred for trial into adult court. However, the Supreme Court ruled that the abolition of the pre-trial transfer process by the YCJA and the establishment of a process for making decisions about adult sentencing for youth only at the sentencing stage required a change in approach to joint trials. Justice Deschamps wrote (at para. 75):

The *B. (D.)* decision will also constrain future legislative reforms of youth justice legislation. In the 2008 election campaign, the Conservative Party again made toughening Canada's youth justice laws an important issue, pledging to enact "new, balanced legislation" that would provide for "enhanced youth sentences" and "automatic, stiffer sentences for persons 14 and older convicted of serious and violent crimes such as murder and manslaughter", as well as for the publication of names of youths 14 years and older who commit such crimes.⁶⁵ Although there has been no general increase in youth crime since the YCJA came into effect, there is a political constituency for "toughening" youth justice laws. Some of the Conservative proposals, especially those dealing with

the overall approach to youth justice — the effect of the objectives of the Act is that the judge is asked to favour rehabilitation, reintegration and the principle of a fair and proportionate accountability that is consistent with the young person's reduced level of maturity. As for the adult criminal justice system, it places greater emphasis on punishment. There is no doubt that how the judge conducts the trial will reflect these different objectives. It would be much more difficult to maintain an approach favourable to a young person if he or she were being tried together with an adult, and the *presumption of diminished moral blameworthiness* to which the young person is entitled could be undermined as a result. (emphasis added)

While refusing to allow trials with adult co-accused, a majority of the Court accepted that the Crown may prefer a direct indictment of an accused youth under s. 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, just as it can for an adult, even if there is no preliminary inquiry or the charges are dismissed after a preliminary inquiry. Justice Abella dissented, focusing on the need to afford youth special legal protections. Although arguably the majority decision about direct indictments takes a narrower view of protection of youth than some prior Supreme Court jurisprudence, the decision should be understood in the context of recognizing any "right" to a preliminary inquiry. The Court seems to be signalling that in light of concerns about systemic delay, it will not be likely to rule unconstitutional efforts of Parliament to reform or abolish preliminary inquiries, provided accused persons get adequate Crown disclosure.

⁶⁴ In *R. v. S. (C.)*, [2009] O.J. No. 1115 (Ont. C.J.) Cohen J. held that 2008 amendments to provisions of the *Criminal Code*, *id.*, that govern the taking of DNA samples for inclusion in the national DNA databank from persons found guilty of "designated offences" violate ss. 7 and 8 of the Charter, to the extent that they apply to young persons. These amendments created a lengthy list of offences for which the taking of a sample is mandatory, a second list for which there is an onus on the youth to satisfy the court why a sample should not be taken, and a third list for which there is a Crown onus to justify the taking of the sample. Although the DNA order is not technically part of the sentencing process, the order for the taking of a sample is made at the time of sentencing. Justice Cohen relied heavily on *R. v. B. (D.)* in concluding that the mandatory and presumptive rules for the taking of DNA samples from youth were unconstitutional, as there needs to be individualized decision-making that takes into account the vulnerability of youth in general, as well as the youth's age, record and amenability to rehabilitation, and the nature of the offence. She ruled that for all listed offences, the onus should be on the Crown to justify the taking of a DNA sample from a young person.

⁶⁵ Prime Minister Stephen Harper announced the Conservative proposals for YCJA reform in a speech on September 22, 2008. See "Balancing rehabilitation and responsibility", September 22, 2008. Online <<http://www.conservative.ca/EN/1091/106115>>. For media reports, see, *e.g.*, C. Campbell, C. Alphonso & L. Perreux, "Harper Pitches Two-Tier Youth Justice Plan", *The Globe and Mail*, September 23, 2008, A1.

automatic “stiffer sentences” and publication of names of young offenders, are likely unconstitutional in light of *R. v. B. (D.)*. Further, the decision seems certain to put to an end any further discussion in Canada of proposals to lower the age of adult criminal responsibility to 16 years of age (as it is in some American states).